Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter Of	**)**	
	)	
Promoting Investment in the 3550-3700 MHz Band	**)**	**GN Docket No. 17-258**
	)	

PETITION FOR RECONSIDERATION OF MILE ONE BROADBAND CONSORTIUM

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SUMMARY

Recent court decisions apply the public forum doctrine to social media infrastructure. In the future, the Citizens Broadband Radio Service and its Spectrum Access System technology are likely to occupy an increasingly pivotal role in this emerging public forum paradigm.

If the new rules require only that priority access licensees who acquire spectrum rights through competitive bidding build out their networks to reach 50% of the population, the available spectrum resources should be adequate to enable broad participation in U.S. technological innovation and telecommunications development. In that event, the blanket exclusion of generally authorized access users from opportunities to acquire quality of services privileges directly from the FCC, and the withholding of administrative incentive fee licensing options and wireless tax certificate relief, will be increasingly more difficult to justify, particularly under a legislative scheme that prioritizes avoidance of mutual exclusivity, and which includes statutory exemptions to competitive bidding.

In this setting, it greatly serves the public interests of the public forum doctrine to broaden the consortium exception to competitive bidding as a means to introduce more flexible alternatives for the emerging regulatory regime for shared spectrum operations: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general …. and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). One key difference between analysis under the Regulatory Flexibility Act and analysis under the public forum doctrine is that consideration of less restrictive alternatives is discretionary under the former, but mandatory under the latter. *F.C.C. v Nextwave Personal Communications*, 537 U.S. 293 (2003) (prohibiting discrimination).

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Mile One Broadband Consortium (hereafter "Mile One"), a licensee in the 3650 – 3700 MHz band, submits the following petition for reconsideration requesting the Commission to reconsider the rules for the Citizens Broadband Radio Service (CBRS) in light of public forum doctrine requirements that call for the use of alternatives that are less restrictive than the limitation of quality of service opportunities to operators that purchase spectrum auctions by auction and the continued withholding of administrative incentive fee licensing options and wireless tax certificate relief.

I. THE PUBLIC FORUM DOCTRINE REQUIRES THE LEAST RESTRICTIVE ALTERNATIVE FOR CONTENT-BASED REGULATION OF SAS ACCESS.

Recent court decisions in *Packingham* and *Knight* which extend the public forum doctrine to social media suggest that the SAS controller apparatus can reasonably be viewed as a governmentally controlled forum for distributing quality of service priorities among military users, and among a binary paradigm for licensed and unlicensed civilian users, which the FCC has decided to administer in the 3550 – 3700 MHz band. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) and *Knight First Amendment Institute v. Trump*, 302 F.Supp.3d 541 (S.D.N.Y. 2018), aff'd in Dkt. No. 18-1691 (2d Cir. 2018).

In essence, the Telecommunications Act of 1996 legislates a designated public forum for participation by market actors in technological innovation and telecommunications development,

to promote "interstate and foreign commerce in communications by wire and radio, so as to make available so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. The Commission can and should operationalize public forum doctrine criteria with the understanding that the SAS controller apparatus is capable of maintaining important forum-based, speaker-based and content-based protections, while effectuating compelling governmental interests in national security and mitigation of harmful interference.

A. Forum-Based Time Place and Manner Regulation Of SAS Access

The First Amendment permits time, place and manner regulation subject to a four prong test: (1) does the regulation serve an important governmental interest; (2) is the government interest served by the regulation unrelated to the suppression of a particular message; (3) is the regulation narrowly tailored to serve the government's interest; and (4) does the regulation leave open ample alternative means for communicating messages. *Central Hudson*, 478 U.S. 328 (1986). The Supreme Court has applied time, place and manner analysis in fact situations ranging from a case involving a challenge to a binary paradigm for regulation of newspaper and commercial handbill dispensers in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), to a case involving a challenge to the exclusion of a convicted sex offender from social media websites in *Packingham*, Id., and to regulate on-line indecency, obscenity and copyright infringement. *Reno v. ACLU*, 521 U.S. 844 (1999). For various reasons, the validity of the FCC's regime of time, place and manner regulations for spectrum sharing are open to question to the extent that the public forum doctrine applies to the CBRS band,

Assuming arguendo that the time, place and manner regulations for the CBRS band can be construed as content neutral, the question arises whether the current rules for the CBRS band fail for want of narrow tailoring. The argument can be made that the rules distort the fit between primary and secondary service distinction on one hand, and the goals of the regulatory regime on the other, with a blanket ban on quality of service opportunities for non-exclusive co-priority operators who elect to by-pass, or cannot afford to engage in, competitive bidding. The rationale for this disparate treatment of quality of service opportunities afforded to operators is vague at best, since reasonable person might ordinarily conclude that the government can accomplish its objectives related to avoidance of mutual exclusivity, and preventive mitigation of harmful interference for PALs tier operations, through a system of flexible consortium exception licensing with in-band quality of service opportunities for groups of non-exclusive co-priority operators that choose to locate their operations in the 3650 – 3700 MHz band rather than the 3550 – 3650 MHz band.

Similarly, the application of a binary paradigm in a manner that disadvantages non-exclusive co-priority operators is facially over broad since the option of allowing variable terms of access to SAS controller functions is available with flexible consortium exception licensing, and is just as effective for time, place and manner regulation as command and control exclusion of operators that prefer to use price mechanisms other competitive bidding to assign value. See, 47 U.S.C. 309(j)(13)(B) and (C). As the Supreme Court explained in *Packingham*, ” … to foreclose access … altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights ... A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen … While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,

today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general …. and social media in particular." To argue that the CBRS rules proposed in the 2017 Notice furnish a narrowly tailored scheme that leaves open ample alternatives for communications between SAS controller devices and domain proxies of the affected operators is both unreasonable and unpersuasive.

B. Speaker-Based Regulation Of SAS Access

The First Amendment also prohibits class based prior restraints on access and restraints based on the identity of the speaker. *Knight,* Id. The principle that speaker discrimination offends the First Amendment is said to be founded on three core principles. First, by regulating who may speak, the government could gain a powerful tool to control the content of what is said. Second, the identity of a speaker shapes how the content of communication is received and interpreted. Third, freedom of speech in a democracy involves the right to have a voice and an opportunity for self-expression. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). *Qualcomm* teaches that norms against speaker based discrimination respecting the equitable right to freedom of internet speech in the cognitive radio ecosphere that federal courts observed in *Packingham* and in *Knight*, and also support the justiciability of an equitable right to access to licensing opportunities in proceedings before the U.S. Court of Appeals for the D.C. Circuit.

The problem here is that the binary paradigm for spectrum sharing in the CBRS band allocates quality of service opportunities from SAS controller systems to network operators and their end users, according to whether in the first instance the operator invokes the FCC's

regulatory jurisdiction to prosecute a mutually exclusive application for a spectrum license through the agency's competitive bidding process. The major purpose for the three tier scheme covering the 3550- 3700 MHz band is the repurposing of a spectrum allocation for military operations with a shared spectrum scheme for military and civilians operations. The proximate cause of the asymmetrical distribution of quality of service opportunities among licensed civilian operations and unlicensed civilian operations opportunities is governmental reliance on a binary paradigm for spectrum sharing in the CBRS band, and on competitive bidding as the operative predicate in that setting for allocating quality of service opportunities to licensed operations and denying quality of service assurances to unlicensed operations. Here as with the analysis of SAS controller functions as a form of forum-based regulations, the question arises whether the binary paradigm of the CBRS spectrum forum is presumptively invalid because a less restrictive quality of service alternative is available to alleviate quid pro quo reliance on compulsory terms of mutual exclusivity in exchange for access to quality of service priorities.

The fundamental problem is that the scheduling priorities administered by SAS controllers threaten to categorically exclude an entire class of operators whose participation is otherwise useful to discharge the Commission's statutory duty to avoid mutual exclusivity. In the current state of the record, there is no constitutionally satisfactory explanation for this outcome. The governmental interests national security, interference mitigation and technological innovation in the CBRS band cannot plausibly justify a categorical seizure by the government of protected liberty and property interests of small operators in economic opportunity; nor can it plausibly justify the unmitigated burden of unbridled governmental searches by way of competitive bidding requirements that operate as a blanket condition for access to quality of service opportunities. According to persuasive authority on point and prevailing canons of

statutory construction for the FCC's duty to avoid mutual exclusivity, the rules for SAS controller functions lead to a form of speaker-based regulation that compares to discrimination based on a bankruptcy petitioner status . *F.C.C. v Nextwave Personal Communications*, 537 U.S. 293 (2003). For reasons analogous to those that prompted the Supreme Court to reject restrictions on campaign expenditures by certain contributors, the Commission should apply the scrupulous exactitude standard to the binary paradigm of its SAS controller scheme, and provide non-auction pricing mechanisms to enable non-exclusive co-priority operators to invest in technological innovation in the CBRS band. *Buckley v. Valeo*, 424 U.S. 1 (1976).

3. Content Based Regulation Of SAS Access

The First Amendment also prohibits content-based prior restraints on protected speech. See, *Matal v. Tam*, 582 U.S. __ (2017). "Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny .... The same is true for laws that, though facially content neutral, cannot be 'justified without reference to the content of the regulated speech,' … " *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) (signs) citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791. Pp. 6–7.

On the threshold issue of whether rules for the SAS controller scheme are content neutral or content based on their face, the argument can be made at a minimum that a cognizable form of content related regulation is involved because, without the exercise of the right to internet speech by subscribers of unlicensed operations, there would be no need for regulations that provide opportunistic access to SAS controller functions by GAA users in the first place. Even assuming

arguendo that the current rules are content neutral, the fact remains that the scheme compromises an entire category of speech by end users by withholding quality of service opportunities to service providers in the GAA tiers. For all the reasons above, it appears that GAA users will have standing to challenge the constitutionality of the contingent blocking of their communications in the SAS context, and that reasonable uncertainty exists in that event about whether the binary paradigm for spectrum sharing can succeed in passing muster. *Knight First Amendment Institute,* Id.

II. THE EXTENSION OF QUALITY OF SERVICE OPPORTUNITIES UNDER A REVISED APPROACH TO CONSORTIUM EXCEPTION LICENSING IS A LESS RESTRICTIVE MEANS TO PROVIDE ACCESS TO THE CBRS BAND.

It serves the public interest in economic opportunity to revisit rules on consortium exceptions to competitive bidding in light of the numerous ways that the Commission can accomplish its goals with less restrictive means that the total exclusion of non-bidders from quality of service opportunities. A set of less restrictive alternatives for interference mitigation and price mechanisms for spectrum valuation are available that can effectively accomplish congressional policy objectives related to economic opportunity and technological innovation without the burden of imposing mutual exclusivity as a condition for access to quality of service opportunities.

It is well known that price mechanisms have been proposed which would enable non-auction allocation of quality of service opportunities to non-exclusive users in exchange for the payment of a fee. License acquisition flexibility has favorable fiscal implication for the national treasury. Careful examination reveals that the public record preceding the 2015 Notice includes a panel findings that small spectrum-based services "express strong demand for …. licenses that could be paid over time from increased subscriber revenue." and that "market-based sharing

regimes have the potential to generate on-going revenues for the Treasury in the form of spectrum usage fees … [I]f we take seriously … estimates of a global business impact in 2020 of up to $4.5 trillion … then even a small penetration of applications paying quality of service fees or other forms of charges could lead to a few billions of dollars in revenue per year. These revenues would help offset the costs of retrofitting and updating various public safety or Federal equipment systems to make them more amenable to dynamic sharing." [1]

The consortium exception rules provide an existing mechanism to realize the later vision. The consortium exception rule currently provides that "[w]here an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for size based bidding credits and/or closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated." 47 CFR 1.2110(b) (4). The Commission has statutory authority to provide for "flexibility of use" pursuant to 47 U.S.C. 303(y) after determining, upon public notice and comment, that flexibility will further the public interest, will not deter investment in communications services and systems, and is consistent with international treaties. 47 U.S.C. § 303(y). The Commission retains ancillary jurisdiction under 47 U.S.C. 154, 309 and 316, to consider applications for consortium exception license modifications in settings other than one described in the FCC's standing rule. The Communications Act shows that Congress clearly understood the nature of the economic opportunities that stem from the development of new digital technologies and service, both when it enacted legislation declaring the policy of the United States to encourage new technologies and services, see 47 U.S.C. § 157, and when it simultaneously codified economic opportunity mandates in the text of Title III, 47 U.S.C. §303(y) and 309(j).

[1] PCAST, at p. 45. See also, CBRS Alliance, The Potential Market Value and Consumer Surplus Value of the Citizens Broadband Radio Service at 3550-3700 in the United States (2018).

For example, Section 309(j)(1) expressly limits FCC authority to use competitive bidding to the award of initial licenses or construction permits. Section 309(j)(1) only permits use of competitive bidding if technical and transactional mutual exclusivity exists among applications. Section 309(j)(2)(A) requires that, to be subject to competitive bidding, the licensee must receive compensation in exchange for providing transmission or reception capabilities to subscribers. Section 309(j) (6)(E) (E) states that nothing in the Communications Act "shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings…." See, 47 U.S.C. 309(j) (1) – (6).

Ideally, the FCC's duty to avoid mutual exclusivity in application and licensing proceedings can be discharged in pre-auction and auction based settings by instituting consortium exception licensing opportunities to cure arbitrary limitations in the standing rules on competitive bidding that hinder small entity capital formation. In theory, the rules for competitive bidding effectuate the duty to avoid mutual exclusivity with references to various categories of auction-exempt licenses: (1) licensing for a spectrum allocation scheme where each licensee has equal right to use the spectrum and no user has the right to exclusive use of an entire spectrum allocation for that service; (2) licensing for new or recently authorized services in which the likelihood of mutually exclusivity is unknown or is debated; and (3) licensing for services or classes of services in which licensees fall outside the scope of Section 309(j)(2)(A) because they receive no compensation from subscribers, a category which includes including broadcast services, private services and mixed use services. In fact, the Commission has already precluded mutual exclusivity for the 3650 – 3700 MHz band as part of the auction design for the

CBRS scheme – for reasons unrelated to preferences for incumbent wireless broadband licensees - and no rulemakings are contemplated for the filing of mutually exclusive applications.

The proposed allowances for flexibility in consortium exception licensing arguably pass muster under a variation of the licensing preferences that were applied in *Qualcomm v. FCC*, 181 F. 3d 1370 (1999) under either the "developed for a particular service" test or the "associated with" (a new technology or service) test. There is a common body of subject matter that unties the scheme of the Communications Act provisions that authorize "awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology …", 47 USC 309(6), and the scheme of U.S. patent laws that recognize the competence of U.S. patent examiners to make determinations about new telecommunications services and technologies. This nexus attests to the competence of U.S. patent examiners to make specialized determinations about the merits of patent claims that enhance the quality of the electromagnetic spectrum as a part of the natural environment. In the current state of the rulemaking process, *Qualcomm* justifies notice of contributions to technological innovation for spectrum commerce that come to light by way of Patent And Trademark proceedings in which FCC licensees and licensee-affiliates are interested parties.

A waiver of SAS quality of service practices to prioritize transmissions by persons that make significant contributions to in the 3550 – 3650 MHz band, is a statutorily permissible ground for consortium exception licensing in the 3650 – 3700 MHz band, and does not rise to the level of reinstating the pioneer's preference that Congress repealed in the 1999. As a threshold matter, waiver of SAS quality of service rules in the 3650 – 3700 MHz in no way obstructs compliance with competitive bidding laws for the 3550 – 3650 MHz band because the governing law mandates economic opportunity considerations, and nothing in the law or the prevailing

technology dictates the imposition of forced terms of mutual exclusivity as a condition for in-band quality of service assurances for protection from interference by secondary users. Nor does a consortium exception licensing procedure with provisions for in-band quality of service opportunities in the 3650 – 3700 MHz band obstruct compliance with the repeal of the pioneer's preference. Mutual exclusivity in the 3650 – 37000 MHz band is not precluded for the specific purpose of awarding licenses, as it was formerly precluded for purposes of awarding of pioneer's preference licenses. Rather, preclusion of mutual exclusivity arises in the 3650 – 3700 MHz band because the Commission instituted a binary paradigm for spectrum sharing that classifies users in the licensed and unlicensed categories in order to restrict quality of service opportunities.

The alternative of awarding of consortium exception licensing opportunities, based on predicate determinations by U.S. patent examiners in the ordinary course of business, also conforms to the statutory criteria that the Commission must "specify the procedures and criteria by which the significance of such contributions will be determined, *after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment* …" 47 U.S.C. (13)(D) (i) (emphasis added). Here, the patent laws enacted by Congress specify a procedure and criteria for determining the significance of contributions to the state of the art in the radio sciences, and thereby enables reliance on PTO examiners for review and verification purposes since they are not employees of the FCC or any FCC license applicant.

Lastly, a less restrictive approach to spectrum sharing, with provisions for flexible consortium exception licensing, is also possible in the auction-based context. According to one spectrum auction expert, an all-consortium auction design is the method of choice to aid

discovery of group bidders that place the highest common value on auction spectrum.[2] In the absence of that method, a pre-auction assessment procedure to reduce demand is useful for situations where applicants are allowed to agree to withdraw from competitive bidding in favor contributing equity for the joint acquisition of licensing rights by members of the consortium, or where competitive bidding does not apply.[3] In that arrangement, parties contending for access to a particular band would have the means to dramatically reduce the transaction costs of an auction-based license acquisition. Cf., 47 U.S.C. 311(c) (1) [4]

III. THE AWARDING OF WIRELESS TAX CERTIFICATE RELIEF IS A LESS RESTRICTIVE ALTERNATIVE TO THE CURRENT CBRS RULES AND LIES WITHIN THE FCC'S SOUND DISCRETION ACCORDING TO THE LAWS AGAINST REPEALS BY IMPLICATION

Wireless tax certificates are an additional means to promote economic opportunity to assure broad participation in the CBRS band. Section 309(j)(4)(D) of the Communications Act, a mandate which provides that the Commission shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures." 47 U.S.C. Section 309(j)(4)(D). In reply comments filed in the PALs Docket, Mile One requested the Commission to revisit the express provisions for tax certificate authority which were enacted by

[2] Cybernomics, Inc., Theory, Experiment and the FCC Spectrum Auctions, Contract Number C-9854019 (2000) (acknowledging role for consortium auctions as a means to ascertain common values); See also, Doyle, C., and McShane, P. (2003). On the design and implementation of the gsm auction in Nigeria - the world's first ascending clock spectrum auction. Telecommunications Policy 27:383–405.

[3] See, Koboldt, C., Maldoom, D., and Marsden, R., The First Combinatorial Spectrum Auction, Lessons from the Nigerian auction of fixed wireless access licences, DotEcon DP No. 03/01, London, England, May 2003.

[4] Levin, D. and J. Kagel, 2005, Almost Common-Value Auctions Revisited, European Economic Review 49, 1125-1136.

Congress in the Omnibus Budget Reconciliation Act of 1993 which remain codified in 42 U.S.C. 309 (j)(4) (D).

In 1993, the FCC's Small Business Advisory Committee, an advisory body the Commission chartered to advise it on spectrum auction policy options, warned that "Rapid deployment of these advanced technologies, without commensurate efforts to promote the diffusion of spectrum use capabilities across economic and geographical lines … is unlikely to achieve intended productivity gains . . " [5] Consistent with those advisory findings, the Commission administered its duties under Section 309 by implementing wireless tax certificates in the Competitive Bidding Fifth Report and Order, 9 FCC Rcd. 5532, paras. 132-33 (1994). Careful examination reveals serious doubts about the technological innovation benefits of the conventional wisdom that the FCC is now barred from issuing Section 309 wireless tax certificates.

It is undeniably true that Congress repealed Section 1071 of title 26 on April 11. 1995 with provisions for retroactivity back to January 25, 1995 that were evidently calculated to remove the availability of tax certificate treatment for the sale of the media conglomerate Viacom to entrepreneur Frank Washington pursuant to the FCC's statement of policy on minority ownership. The text of the statute contains a heading entitled "Repeal of Nonrecognition On FCC Certified Sales And Exchanges," followed by the retroactive striking of certain references to 26 U.S.C. 1071 from the Internal Revenue Code. Below the striking provisions appears a savings clause with text that affirmatively extended authority to certify capital gains deferrals under 26 U.S.C. 1033. The express purpose of that provision was to leave

[5] U.S. Federal Communications Commission, Interim Report of the Federal Communications Commission Small Business Advisory Committee for FY 1993.

FCC authority to implement its relocation policy for microwave licensees intact.[6] Further. the legislative history of the 1995 Act refers almost exclusively to sales and exchanges of interests in mass media facilities that were formerly covered by Section 1071 and by the FCC's former minority ownership policies.[7]

In cases presenting a question of statutory construction about whether to attribute intent to repeal prior legislation, the doctrines of plain repugnancy and clear incompatibility supply the guiding principles for the prevailing standards of review. *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 551 U.S. 264, 267 (2007); cf., *Harford v. United States*, 12 U.S. 109, 109-10 (1814). The doctrine on implied repeals holds that, while legislature cannot abridge the powers of a succeeding legislature, see *Lockhart v. United States,* 546 U.S. 142 (2005), cf., *Fletcher v. Peck,* 6 Cranch 87, 135 (1810), and "an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith,* 538 U. S. 254, 273 (2003). Furthermore, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1018 (1984) (citations omitted).

It cannot reasonably be said that the text or the legislative history of the repeal statute for Section 1071 is plainly repugnant, clearly incompatible or in irreconcilable with the wireless tax certificate provisions of the 1993 Act. The 1995 Act cancelled the FCC's use of Section 1071 based on hearing testimony that was almost exclusively addressed to mass media sales and exchanges of the type that involved the Viacom sale. The enactment of the repeal does not

[6] See, Public Law 104-7, 109 STAT. 93, April 11. 1995 ("repeal statute").
[7] See, FCC Minority Tax Certificates, Hearings before the Subcommittee of the Committee on Ways and Means, House of Representative, 104th Congress, January 27, 1995; and Hearings before the Committee on Finance, United States Senate, 104th Congress, March 7, 1995.

appear in citations to legislation that modifies 42 U.S.C. 309 (j)(4) (D). The saving clause in the 1995 Act affirmatively extended involuntary conversion protection to microwave services that were never treated as mass media facilities under Section 1071. At the time of these events, moreover, there was little or no industry experience with wireless tax certificates in 1995 because the first wireless auction at the FCC, and in the world, had just been conducted in 1994. The legislative scheme that came about from the inclusion of capital gains deferrals in the 2017 tax reform legislation also casts serious doubt on the rationality of holding Section 309 tax certificate authority in abeyance. If the Congress intended to strike down the FCC's wireless tax certificate authority, that intent is virtually impossible to discern from the purpose, text, history, structure, and legislative scheme of the 1993 and 1995 Acts.

The abeyance in the administration of the FCC's wireless tax certificate program, according to one commenter, is best explained as a discretionary response to the rendition of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (1995), and to related abandoned litigation challenging 42 U.S.C. 309 (j)(4) (D).[8]. Witnesses opposing the FCC's minority ownership policies claimed that the minority tax certificate policy was racially discriminatory and economically wasteful social policy with no empirical evidence to withstand cost benefit analysis. The equities of shared spectrum commerce weigh in favor of a different approach that renders those arguments moot. The legal rationale for using 26 U.S.C. 1071 to promote diversity of viewpoints was never implicated by the FCC's regulatory scheme for wireless services, and even if had or could be, the Supreme Court's recent decision in Fisher v. Texas, to recognize a compelling governmental interest in diversity. Further, the economic rationale for tax certificates, attested to by witnesses who testified in favor of the program, held

[8] Bush, Antoinette Cook and Martin, Marc S. (1996) "The FCC's Minority Ownership Policies from Broadcasting to PCS," Federal Communications Law Journal: Vol. 48: Iss. 3, Article 3.

that the FCC's use of Section 1071 had led to dramatic improvements in the information structure of spectrum license markets, with minimal governmental intrusion, by incentivizing investors and sellers to discontinue transactional behavior that had unfairly excluded minority groups from spectrum commerce in the past.

Concerns about congressional intent to repeal wireless tax certificate authority, and related conjecture about whether FCC tax certificates authority can withstand judicial review, are conclusively rebutted by the prevailing Supreme Court case law on point. In other words, the 1993 Act represents a form of "express reference legislation" in relation to the FCC's wireless tax certificate authority, and the 1995 Act represents a form of "implied reference legislation" that qualifies for review under the law on implied repeals. The inference of an implied repeal is facially unsustainable under *Lockhart* because the legislative history of the 1995 Act is inherently vague with respect to wireless tax certificates. The inference of repeal is additionally suspect because the retroactivity provisions of the repeal legislation directly implicate the Fifth Amendment prohibition against impairment of contracts.[9] Further, the idea that an inference of repeal can be drawn from the mere inclusion of the words, "tax certificates," in both the 1993 Act and the 1995 Act leads to an absurd result. If that were so, it would follow that the mere inclusion of the words "tax certificates" in the 2017 tax reform legislation that the tax certificate clause in the 1995 Act has been repealed.

The inference of an implied repeal is extinguished in its entirety under the pragmatic structural analysis embodied by the four part test in *Credit Suisse*.[10] Regulatory authority exists

[9] In *Lockhart*, where the question revolved around a controversy about collection student loan debt, the Supreme Court applied those principles to conclude that express reference legislation can indeed be overruled by implied reference legislation with a clear legislative history, so as to authorize the debt collection in question.

[10] In *Credit Suisse*, the major issue was whether there was "plain repugnancy" between certain federal antitrust claims and the federal securities laws. The Court held that the conflict between differing

under express reference legislation in the 1993 Act to supervise the investment activities of spectrum licensees that is inapposite to the race-based policy attributes that the *Adarand* court invalidated on Fifth Amendment due process grounds. The regulatory entities that have authority to act in the tax certificate field are the FCC pursuant to Section 309 of title 42 and the IRS pursuant to Section 1033 of title 26 and the 2017 tax reform legislation. The risk is negligible that the illusory conflict between the express reference legislation in the 1993 and 2017 Acts, and the implied reference legislation in the 1995 Act, would cause the FCC and the IRS to issue conflicting guidance, requirements, duties, privileges, or standards of conduct, because there is no question that Congress intended for the IRS to defer to FCC as the dominant regulatory agency of the field of spectrum commerce. Consequently, there is no material conflict between the tax certificates that pertain to wireless services under the unrepealed express reference legislation (i.e. Section 309 tax certificates), and the tax certificates that pertained to mass media services that the implied reference legislation (i.e. Section 1071 tax certificates) was enacted to curtail. Equally important, some wireless broadband licensees are similarly situated in principle with the microwave licensees that Congress designated for wireless tax certificate benefits at the same time that it repealed 26 U.S.C. 1071.

A fair reading of the plainly repugnant and clearly incompatible standards in this case suggests that the open question of law is whether the inference of repeal under the 1995 Act is sustainable considering that the FCC's exertions of Section 309 tax certificate authority are clearly reflected in the legislative history on the repeal of Section 1071 tax certificate authority.

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legislative schemes did not immediately and directly constitute a "plain repugnancy," considering the broad powers of the lead agency, the U.S. Securities and Exchange Commission. To reach that decision, the Court considered a four factor text: (1) the existence of regulatory authority under the governing law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a resulting risk that the conflicting laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct and (4) whether the possible conflict affected practices that lie squarely within an area of activity that the ancillary law seeks to regulate.

Because fundamental First Amendment norms constrain administrative reliance on a repeal of Title 26 subject matter under the 1995 Act that would abridge surviving Title 47 interests in freedom of expression that Congress protected in connection with the right to petition for spectrum licenses pursuant to 47 U.S.C.. 151 and 309, a reasonable person could conclude that the Commission can and should take care to address the availability of tax certificate relief as a major regulatory flexibility issue for Spectrum Pipeline Act purposes in its report to Congress. Reference to the law on implied repeals assures that the issue can be evaluated in a way that avoids conflating the political question that Congress spoke to when it decided that the FCC;s Section 1071 tax certificate program should cease, and the legal question that *Credit Suisse* answers about the on-going validity of the FCC's Section 309 wireless tax certificate authority.

CONCLUSION

As the Commission proceeds towards the completion of the reconsideration phase of its rulemaking process, it should carefully consider that that the issuance of wireless tax certificates and the award of flexible consortium exception licenses will likely contribute to economic opportunity for a broader spectrum of stakeholders. Using those approaches, the Commission can and should retain "innovation band" status for the 3650 – 3700 MHz part of the CBRS band.

As shown stated the indictment issued in *United States v. Internet Research Agency, LLC et al*, Case 1:18-cr-00032-DLF (D.D.C., filed February 16, 2018), there are compelling public policy and national security considerations to take into account in assessing the accessibility of the CBRS band by deserving stakeholders: "From in or around 2014 to the present, [operatives of the Russian Federation] knowingly and intentionally conspired … to defraud the United States … for the purpose of interfering with the U.S. political and electoral processes … ", and did so by using U.S. social media infrastructure and race conscious measures to create "political

intensity through supporting radical groups, users dissatisfied with [the] social and economic situation and oppositional social movements…" See, U.S. v. IRA, at paras. 2, 33 and 34. Clearly, the IRA should not have greater access to America's social media in the CBRS band that do America's citizens who pioneered the 3650 – 3700 MHz band from its inception.

The necessity for an efficient public forum compliance plan for the CBRS band, to provide economic opportunity and to reduce vulnerability of Americans to foreign influences, cannot be overstated as a condition for the preservation of the self-correcting process of truth:

> Those who won our independence believed . . . that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Consistent with the public policy and national security interests above, Mile One urges the Commission to prioritize the public interest in affording the broadest possible access to the CBRS as a designated public forum for internet speech.

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Respectfully submitted,

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